LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 30 1963
JOHN F. DAVIS, CLERK

In The Supreme Court of The United States

October Term, 1963

No. 291

PIERCE OLIVER KIDD BREWER,
ROBERT A. BURCH and
ROBERT M. BURCH,
Appellants,

v.

STATE OF NORTH CAROLINA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION TO DISMISS

T. W. BRUTON
Attorney General of North Carolina

HARRY W. McGALLIARD
Deputy Attorney General

Justice Building,
Raleigh, North Carolina

Counsel for the State of North Carolina
and Appellee.

INDEX

Statement of the Case 1

I. The Federal question raised by appellants in the State Court is not a substantial Federal question 1

Motion to Dismiss 15

TABLE OF CASES

Blowing Rock v. Gregorie, 243 N. C. 364 14

Boyce Motor Lines v. United States, 342 U. S. 337, 72 S. Ct. 329, 96 L. ed. 367 12

Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. ed. 322 4

Fox v. Washington, 236 U. S. 273, 35 S. Ct. 383, 59 L. ed. 573 11

Goring v. United States, 312 U. S. 19, 61 S. Ct. 429, 85 L. ed. 488 11

Heydon's Case, 3 Co. Rep. 72, 76 Eng. Repr. 637 (1584) 12

Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 Sup. Ct. Rep. 147 ..... 10, 12

Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780 10

Omaechevarria v. Idaho, 246 U. S. 343, 38 S. Ct. 323, 62 L. ed. 763 9

People v. Davis, 160 N. Y. S. 769 13

Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. 2d 1498 12

Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. ed. 1495 9

State v. Coal Co., 210 N. C. 742, 188 S. E. 412 ..... 4, 8

State v. Hales, 256 N. C. 27, 122 S. E. 2d 768 ..... 3, 5, 15

State v. Leuders, 214 N. C. 558, 200 S. E. 22 ..... 3, 15

State v. Morrison, 210 N. C. 117, 185 S. E. 674 ..... 4, 8

State v. Partlow, 91 N. C. 550 4

State v. Warren, 252 N. C. 690, 114 S. E. 2d 660 ..... 3, 15

State v. Welsh, 10 N. C. 404 14

State v. Wollard, 119 N. C. 779, 25 S. E. 719 14

Surplus Store, Inc. v. Hunter, 257 N. C. 206 4

Tobacco Co. v. Maxwell, Comr. of Revenue, 214 N. C. 367 8
Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917 10
United States v. Petrillo, 332 U. S. 1, 67 S. Ct. 1538, 91 L. ed. 1877 .. 12
United States v. Ragan, 314 U. S. 513, 62 S. Ct. 374, 86 L. ed. 383 ... 11
Whitney v. California, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095 ... 11
Williams v. United States, 341 U. S. 97, 71 S. Ct. 576, 95 L. ed. 774 .. 8

FEDERAL STATUTES

Civil Rights Statute (18 U. S. C. A. 242) 8

NORTH CAROLINA STATUTES

Sec. 14-353, General Statutes of North Carolina 2, 3, 13, 14, 15
Sec. 14-354, General Statutes of North Carolina 3, 14
Chapter 75, General Statutes of North Carolina 8

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment V 4
Constitution of the United States, Amendment XIV 4

TEXTS AND ENCYCLOPEDIAS

14 Am. Jur., Criminal Law, Sec. 19 ..... 4, 5
50 Am. Jur., Statutes, Sec. 159 14
16A C. J. S., Constitutional Law, Sec. 580 5
22 C. J. S., Criminal Law, Sec. 24(2) 4, 5
Wharton's Criminal Law and Procedure, 1957, Vol. 1, Sec. 18 ..... 4, 5

In The
Supreme Court of The United States

October Term, 1963

No. 291

PIERCE OLIVER KIDD BREWER,
ROBERT A. BURCH and
ROBERT M. BURCH,
Appellants,

v.

STATE OF NORTH CAROLINA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION TO DISMISS

STATEMENT OF THE CASE

The appellants, in the statement as to jurisdiction, have set forth an adequate statement of the history of the case and repetition here would serve no useful purpose.

I

THE FEDERAL QUESTION RAISED BY THE APPELLANTS IN THE STATE COURT IS NOT A SUBSTANTIAL FEDERAL QUESTION.

We take the position that in view of previous decisions of this Court on the subject complained about by the appellants, the question has been decided and passed upon by this Court,

and no substantial Federal question now exists. This Court has repeatedly laid down standards for determining the constitutionality of a statute attacked on the grounds of vagueness or arbitrariness and an application of those standards and tests to the instant North Carolina statute clearly indicate that no substantial Federal question is being presented for hearing on appeal.

G. S. 14-353 was first enacted as Section 1 of Chapter 190 of the Public Laws of 1913, and it can more readily be understood and correctly construed if it is first examined in its setting as part of Chapter 190, which entire Chapter reads as follows:

AN ACT TO PROHIBIT INFLUENCING AGENTS, EMPLOYEES AND SERVANTS.

"The General Assembly of North Carolina do enact:

"Section 1. That whoever gives, offers or promises to an agent, employee, or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; that any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; that any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus shall be punished in the discretion of the court.

"Sec. 2. That no person shall be excused from attending, testifying or producing books, papers, contracts, agreements and documents before any court or in obedience to the subpoena of any court having jurisdic-

tion of the crime herein denounced on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said court or in obedience to its subpoena or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or documents shall be exempted from such prosecution and punishment for perjury committeed in so testifying.

"Sec. 3. That this act shall be in force from and after its ratification."

Section 1 became Section 4475 of the Consolidated Statutes and is now 14-353 of the General Statutes. Section 2 became Section 4476 of the Consolidated Statutes and is now Section 14-354 of the General Statutes. The section title or catch-line of G. S. 14-353 is, "Influencing agents and servants in violating duties owed employers." This is not a mere non-legislative editorial aid; it is a statutory section title first appearing in the Consolidated Statutes and later appearing as the section title when G. S. 14-353 was reenacted into law as part of the General Statutes of North Carolina, the present Code, enacted as Chapter 33 of the Session Laws of 1943.

Before considering the statute more specifically, certain general principles should be considered. In the recent case of STATE v HALES, 256 NC 27, in which the constitutionality of the "Shoplifting" statute was upheld, Mr. Justice Parker wrote, in part, as follows, at p. 30 and pp. 32-33:

"In passing upon the constitutionality of this statute there is a presumption that it is consitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision. S. v WARREN, 252 NC 690, 114 SE 2d 660; S. v LEUDERS, 214 NC 558, 200 SE 22."

* * * * *

" 'A criminal statute must be definite as to the persons

within the scope of the statute and the acts which are penalized. If it is not definite, the due process clause of State Consitutions and of the Fifth and Fourteenth Amendments to the Federal Constitution, whichever is applicable, is violated. If the statute is so vague and uncertain that a reasonable man would be compelled to speculate at his peril whether the statute permits or prohibits the act he contemplates committing, the statute is unconstitutional. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct. If on its face a criminal statute is repugnant to the due process clause, specifications of details of the offense intended to be charged will not serve to validate it, it being the statute and not the accusation under it that prescribes the rule to govern conduct and warns against transgression . . . In determining whether a statute is sufficiently certain and definite the courts apply higher standards in the case of a criminal than a civil statute. . . . While a penal statute must be sufficiently definite to apprise a person of ordinary intelligence of the conduct which is prohibited, IT IS NOT NECESSARY THAT THE FORBIDDEN CONDUCT BE DESCRIBED WITH MATHEMATICAL PRECISION OR ABSOLUTE CERTAINTY . . . A STATUTE IS NOT UNCONSTITUTIONAL AS INDEFINITE BECAUSE IT EMPLOYS GENERAL TERMS, WHEN SUCH TERMS CONVEY TO A PERSON OF ORDINARY UNDERSTANDING AND INTELLIGENCE AN ADEQUATE DESCRIPTION OF THE PROHIBITED ACT, FOR IMPOSSIBLE STANDARDS OF CERTAINTY ARE NOT REQUIRED. REASONABLE CERTAINTY IS SUFFICIENT:' Wharton's Criminal Law and Procedure, 1957, Vol. 1, Section 18. To the same effect, 22 C.J.S., Criminal Law, Section 24 (2) a; 14 Am. Jur., Criminal Law, Section 19. See also, S. v PARTLOW, 91 NC 550; S. v MORRISON, 210 NC 117, 185 SE 674; S. v COAL CO., 210 NC 742, 188 SE 412." (Emphasis added)

In the recent decision of SURPLUS STORE, INC. v HUNTER, 257 NC 206, at 211-212, Mr. Justice Bobbitt wrote, as follows:

"In CONNALLY v GENERAL CONSTRUCTION Co., 269 US 385, 46 S. Ct. 126, 70 L. ed. 322, the applicable

rule is stated by MR. JUSTICE SUTHERLAND as follows: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

" '. . .the terms of a criminal statute must be sufficiently explicit to inform those subject to it what acts it is their duty to avoid or what conduct on their part will render them liable to its penalties, and no one may be required, at the peril of life, liberty, or property to guess at, or speculate as to, the meaning of a penal statute.' 22 C.J.S., Criminal Law, Sec. 24(2)(a); 16A C.J.S., Constitutional Law, Sec. 580; 14 Am. Jur., Criminal Law, Sec. 19; Wharton's Criminal Law and Procedure, Vol. 1, Sec. 18; S. v Hales, 256 NC 27, 122 SE 2d 768, and cases cited therein. TRUE, REASONABLE CERTAINTY IS SUFFICIENT; AND THIS COURT IN *S. v HALES*, SUPRA, HELD THE PROVISIONS OF THE STATUTE THEN UNDER CONSIDERATION SUFFICIENTLY DEFINITE TO INFORM 'A PERSON OF ORDINARY INTELLIGENCE WITH REASONABLE PRECISION OF THE ACTS IT PROHIBITS.' " (Emphasis added.)

Additional pertinent discussion is contained in 22 C.J.S., CRIMINAL LAW, Section 24 (2), pp. 62-73:

"As a general rule, crimes must be defined in a statute with appropriate certainty and definiteness, and the standards of certainty in statutes prescribing punishment for offenses are higher than in those depending primarily on civil sanction for their enforcement. There are no constructive criminal offenses, as is discussed supra, section 17, and purely statutory offenses cannot be established by implication. Acts otherwise innocent and lawful do not become crimes unless there is a clear and positive expression of legislative intent to make them criminal. Statutes creating criminal offenses should be clear and unambiguous, and a penal statute should not admit of such a doublemeaning that a citizen may act on one conception of its requirements and the

courts on another. A penal statute should explicitly establish the elements of the crime which it creates, and provide some reasonably ascertainable standards of guilt; and standards of proscribed conduct must be particularly definite where the conduct forbidden is an omission.

"A penal statute must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty, and this rule applies, of course, where the statute creates an offense which was not a crime at common law. In other words, the terms of a criminal statute must be sufficiently explicit to inform those subject to it what acts it is their duty to avoid or what conduct on their part will render them liable to its penalties, and no one may be required, at the peril of life, liberty, or property to guess at, or speculate as to, the meaning of a penal statute. In determining whether the language of the statute complies with the requirement of certainty, the statute is to be viewed from the standpoint of a reasonable man, or a person of ordinary intelligence, who might be subject to its terms; and the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, the underlying principle being that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

"The constitutional vice in a vague or indefinite statute is the injustice to accused in placing him on trial for an offense as to the nature of which he is given no fair notice, and the essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct . . .

"In determining whether a statute meets the requireof certainty, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. ABSOLUTE CERTAINTY IS NOT REQUIRED IN A CRIMINAL STATUTE, AND THE STANDARDS OF GUILT PRESCRIBED THEREIN NEED NOT BE SO PRECISE AS TO BE CAPABLE OF REDUCTION TO AN EXACT MATHEMATICAL FORMULA OR OF MECHANICAL APPLICATION. REASONABLE CERTAINTY, IN VIEW OF THE CONDITIONS,

IS ALL THAT IS REQUIRED, AND LIBERAL EFFECT IS ALWAYS TO BE GIVEN TO THE LEGISLATIVE INTENT WHEN POSSIBLE. So, in determining whether a statute meets the test of specificity, it should be given its fair meaning in accordance with the evident intent of the legislature, and IT SHOULD NOT BE HELD VOID FOR UNCERTAINTY IF ANY REASONABLE AND PRACTICAL CONSTRUCTION CAN BE GIVEN TO ITS LANGUAGE. So long as the standards laid down by the legislature in penal provisions are capable of reasonable application to varying fact situations, no fault can be found with the statutes.

* * *

"Mere difficulty in ascertaining the meaning of words employed in a criminal statute, or the fact that certain language is ambiguous will not invalidate a statute on account of vagueness, and a penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited, or is as definite in meaning as the nature of the subject will allow. While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the possibility of more than one construction. So, difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute invalid for indefiniteness, and if the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be held objectionably vague even though marginal cases could be put where doubts might arise. In other words, doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness.

"The mere fact that the specified standard of liability may be one of varying degree does not make a criminal statute invalid, and a consitutional objection of vagueness cannot validly be raised against a statute because there is an element of degree in the definition of terms therein as to which estimates might differ. The standards of guilt prescribed in a statute defining a crime may be flexible and require the exercise of judgment and the making of careful estimates in applying them to a given set of facts. So, a penal statute is not void merely because

> juries may differ in their judgment in cases brought thereunder on the same state of facts; and the mere fact that a penal statute is so framed as to require a jury on occasion to determine a question of reasonableness does not make it too vague to afford a practical guide to permissible conduct."

In STATE v COAL CO., 210 NC 742, the Supreme Court of this State had before it a constitutional attack for vagueness directed to the statute prohibiting contracts, conspiracies and combinations in restraint of trade. The language of this statute is indeed very vague. The statute is too long to quote (it appears now as Chapter 75 of the General Statutes) but it abounds in generalities. It had to be written in general terms because of the unlimited capacity of mankind to devise schemes to destroy competition and restrain trade contrary to the competitive system of the open market. The Court held that this statute was constitutional and valid as against an attack based upon uncertainty, vagueness or indefiniteness.

In TOBACCO CO v MAXWELL, COMR. OF REVENUE, 214 NC 367, the Supreme Court of North Carolina, as against a charge of void because of vagueness, upheld the constitutional validity of the Scrap Tobacco Act. This Act defines scrap tobacco in rather general terms and the definition appears in the opinion. In this connection, the Court said:

> "The classification of scrap or untied tobacco by members of the trade appears to be a well recognized and precise, descriptive term, and the statutory definition as herein interpreted is in accordance with the common and general usage of the term within the trade itself . . .
>
> "The 1935 Scrap or Untied Tobacco Act was declared unconstitutional on the ground of vagueness and uncertainty in S. v MORRISON, 210 NC 117; the 1937 act here considered is free of the fatal shortcomings of the prior act."

In WILLIAMS v UNITED STATES, 341 US 97, 71 S. Ct. 576, 95 L. ed 774, the Supreme Court of the United States had before it an attack upon a Civil Rights Statute (18 USCA

242) which is perhaps the most indefinite and the vaguest statute in the Federal Criminal Code. The statute reads as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both."

In disposing of this contention, the Court said:

> "Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific."

In the case of SCREWS v UNITED STATES, 325 US 91, 65 S.Ct. 1031, 89 L.ed. 1495, the Supreme Court of the United States again upheld this same Civil Rights Statute as against the same type of constitutional attack, the Supreme Court saying:

> "But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."

In the case of OMAECHEVARRIA v IDAHO, 246 US 343, 38 S.Ct. 323, 62 L.ed. 763, the Supreme Court of the United States had before it a statute written in very general terms and which is quoted in the case as follows:

> "Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed, or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer, or winter range for his cattle, is guilty

of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

In upholding this statute against an attack of void for vagueness, the Court said:

> "It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guaranty by the 14th Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a 'range,' or for determining what length of time is necessary to constitute a prior occupation a 'usual' one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. NASH v UNITED STATES, 229 US 373, 377, 57 L.ed. 1232, 1235, 33 Sup. Ct. Rep. 780; MILLER v STRAHL, 239 US 426, 434, 60 L.ed. 364, 368, 36 Sup.Ct.Rep. 147 . . ."

In the case of NASH v UNITED STATES, 229 US 373, 57 L.ed. 1232, the Supreme Court of the United States considered this type of attack upon the Monopoly or Anti-trust Statute. In upholding the statute, Mr. Justice Holmes said:

> "And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. TOZER v UNITED STATES, 4 Inters.Com.Rep. 245, 52 Fed. 917, 919.
>
> "But apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of in-

> stances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death . . ."

We could quote from many cases and cite many statutes written in general terms that have been upheld but for the sake of brevity we shall merely refer to a few more cases and the type of statute considered.

In FOX v WASHINGTON, 236 US 273, 35 S.Ct. 383, 59 L.ed 573, a statute of the State of Washington which made it unlawful to print, publish, or knowingly circulate any book, paper or document advocating or inciting the commission to any crime, breach of the peace or act of violence, was upheld with Mr. Justice Holmes writing the opinion. This statute was stated in general terms.

In WHITNEY v CALIFORNIA, 274 US 357, 47 S. Ct. 641, 71 L.ed. 1095, the Criminal Syndicalism Act of California, which prohibited teaching or advocating the commission of crime, sabotage, unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, was upheld as against this type of attack.

In GORING v UNITED STATES, 312 US 19, 61 S. Ct. 429, 85 L.ed. 488, the Supreme Court had before it on this same type of attack the Espionage Act of June 15, 1917. The words "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation" were said to be sufficiently definite for a criminal statute.

In UNITED STATES v RAGAN, 314 US 513, 62 S. Ct. 374, 86 L.ed. 383, the Supreme Court of the United States upheld a provision of the Revenue Act of 1932, declaring guilty of a felony "(a)ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or any payment thereof" as not being too vague or a delegation of power.

As against the same charge the clause "a reasonable allowance for salaries or other compensation for personal service actually rendered" was also upheld. The Court upheld the rule that a successful attack based on undue vagueness cannot be made where the sanctions of the statute apply only if intent or scienter is first established.

See also on this point the following authorities:

BOYCE MOTOR LINES v UNITED STATES, 342 US 337, 72 S. Ct. 329, 96 L.ed. 367,

ROTH v UNITED STATES, 354 US 476, 77 S.Ct. 1304, 1 L.ed. 2d 1498;

UNITED STATES v PETRILLO, 332 US 1, 67 S. Ct. 1538, 91 L.ed. 1877;

MILLER v STRAHL, 239 US 426, 36 S.Ct. 147, 60 L.ed. 364.

In 1584, Lord Coke most aptly described the judicial function in construing statutes as follows:

> "And it was resolved by them, that for the full and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:—1st. What was the common law before the making of the act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth? And 4th. The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act *pro bono publico*."

HEYDON'S CASE, 3 Co. Rep. 72, 76 Eng. Repr. 637 (1584).

What, then, is the mischief which the General Assembly has sought to suppress in G. S. 14-353?

This statute is designed to prohibit the very thing for which these defendants are indicted. It is designed to make criminal the acceptance of gifts on the part of an employee or agent who attempts to exercise influence on his employer's business by influencing the purchase of materials from a selected company or group of companies; or to prevent the employee from revealing the employer's confidential business affairs; or to prevent the employee or agent from revealing to competitors the trade secrets of the employer. It is absurd to say that the employer could be indicted under this statute because he pays his employee a bonus or gives his employees gifts during certain holiday periods. It was certainly the intention of the General Assembly to prohibit forms of bribery of employees or agents under the guise of gifts and gratuities to the detriment of the employer's business. Certainly, no employer will pay his employees or agent to act contrary to the interest of the employer. Admitting for the sake of argument that an employer could technically be within the scope of the statute, such an argument could be of no avail to these defendants for they do not fall within the class of employers who have given gifts to their own employees.

It should be pointed out that the New York statute has been held to be constitutional as against a charge that it singles out for discrimination certain classes of citizens; and also against the charge that it curtails the right to contract; and against the charge that here is no sufficient justification in the health, morals or welfare of the community. The question of vagueness of the statute was not considered in this case (PEOPLE v DAVIS, 160 N.Y.S. 769).

Let us look again more directly at the North Carolina statute which was set out in full in its complete enacted context above at the beginning of the argument under this question. The particular provisions which relate to the indictments in the instant case are embedded in a framework of

condemnation of acts done to an agent or employee or by the agent or employee to the detriment of his principal's or employer's welfare. A section providing civil and criminal immunity in the case of furnishing evidence against a violator does not indicate that the General Assembly had in mind someone tipping a waitress for services already rendered. Defendant's interpretations along this line are strained, farfetched and untenable. The context of G.S. 14-353 standing alone indicates the criminal, reprehensible type of conduct being condemned. The context of that section considered with respect to the original enacting statute, which would include G.S. 14-354, strengthens the legislative intent. The legislative title to the section, "INFLUENCING AGENTS AND SERVANTS IN VIOLATING DUTIES OWED EMPLOYERS," adds additional strength to the interpretation urged by the State. This title was enacted into law as part of the General Statutes of 1943 when the General Statutes were adopted by Chapter 33 of the Session Laws of 1943. With respect to the use of the title of a section or act to indicate legislative intent, this Court has already expressed itself.

In the case of BLOWING ROCK v GREGORIE, 243 NC 364, at 371, Mr. Justice Parker wrote as follows:

> "At the common law in England the title of an act was no part of the act. S. v WELSH, 10 NC 404; S. v WOOLARD, 119 NC 779, 25 SE 719; 50 Am.Jur., Statutes, Sec. 159. In this section of Am. Jur., it is said: 'Originally, in England, titles were given to statutes by the judges who drew up the statutes from the records of Parliament. In the reign of Henry VI, bills in the form of statutes without titles were introduced.' In S. v WOOLARD, supra, it is said: 'Indeed, prior to the eleventh year of Henry VII (1495), titles were very rarely prefixed at all. But now the title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the Act. Indeed, so far is this true, and so important has the title become, that in many State Constitutions there are now provisions to guard against the title of bills being misleading. *Ratione cessante, cessat ipsa lex.* CONSEQUENTLY WHEN THE MEANING OF AN ACT IS AT ALL

DOUBTFUL, ALL THE AUTHORITIES NOW CONCUR THAT THE TITLE SHOULD BE CONSIDERED.' " (Emphasis added.)

It must be remembered that, as stated in STATE v HALES, supra, at 30, "(i)n passing upon the constitutionality of this statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision. S. v. WARREN, 252 NC 690, 114 SE 2d 660; S. v. LUEDERS, 214 NC 558, 200 SE 22."

For the foregoing reasons, the State urges that G.S. 14-353 is not vague, indefinite, and uncertain and does not constitute an arbitrary and capricious exercise of the police power of the State. Therefore, the Court below properly held that this statute is not unconstitutional.

. . . . .

MOTION TO DISMISS

For the reasons set out above, the Attorney General of North Carolina moves the Court to dismiss this appeal for the following reason:

The questions attempted to be raised by the appellants have been decided and set at rest by this Court, and any Federal question attempted to be raised by the appellants is unsubstantial.

Respectfully submitted,

T. W. BRUTON
Attorney General of North Carolina

HARRY W. McGALLIARD
Deputy Attorney General

Counsel for the State of North Carolina
and Appellee.

MICRO CARD
TRADE MARK ®
22
PC II 2
MATTHEW BENDER & COMPANY
MB
6-64
microcard